Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. **77-1342**

EVERETT I. PERRIN, JR.,
Petitioner

v.

RICHARD DUNN,
Respondent

No.

EDWARD COX, ET AL.,
Petitioners

v.

LAURENCE BLACK,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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OPINIONS BELOW

Neither the opinion of the United States Court of Appeals for the First Circuit nor that of the United States District Court for the District of New Hampshire is as yet generally reported. However, the First Circuit's opinion appears in Appendix I, and the District Court's in Appendix II. For the opinions of the New Hampshire Supreme Court on the earlier, direct appeals, see

State v. *Black*, 116 N.H. 836, 368 A.2d 1177 (1976), *cert. denied* ____ U.S. ____ (1977), presented in Appendix III, and *State* v. *Belkner, et al.*, ____ N.H. ____, 374 A.2d 938 (1977), presented in Appendix IV.

JURISDICTION

The First Circuit's judgment was entered on February 2, 1978, and no rehearing was sought. This petition has been brought within ninety days of that judgment. The Supreme Court has jurisdiction under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Were the instructions on reasonable doubt by the State trial court* reversible error?

2. Were those instructions so prejudicial that a Federal court could sustain collateral attacks on them and thus vitiate contrary unanimous judgments of the State's highest court?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the due process clause of the Fourteenth Amendment: " . . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

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*No evidence was adduced at the federal habeas corpus hearing on how many times these instructions had been given in other trials either by this State judge or by other State judges. However, this judge has been on the New Hampshire Superior Court since 1957 and has been its Chief Justice since 1971. He presided over a notorious murder case in 1973. See *State* v. *Breest*, 116 N.H. 734, 367 A.2d 1320 (1976). And the measure of his influence on other Superior Court judges may be inferred from his position as Chief Justice.

STATEMENT OF THE CASE

On April 19, 1976, a New Hampshire state jury found Black guilty of theft of less than $100, guilty of tampering with a witness, and not guilty of tampering with another witness. At trial his counsel made timely objections and exceptions to the court's instructions on reasonable doubt. On direct appeal, the New Hampshire Supreme Court unanimously affirmed, finding no reversible error in the instructions. See Appendix III. Black's petition to the United States Supreme Court for a writ of certiorari was denied.

On June 1, 1976, a New Hampshire state jury found Dunn guilty of riot at the State Prison. Tried with Dunn on the same offense were three other prisoners; two were also found guilty, and one not guilty. At trial Dunn made no timely objection to the court's instructions on reasonable doubt. Those instructions were given once before deliberations and repeated once during deliberations. On direct appeal, the New Hampshire Supreme Court unanimously affirmed, finding in any event no reversible error in the instructions. See Appendix IV. Dunn did not petition this Court for a writ of certiorari.

The disputed instructions in the two cases were given by the same judge and were virtually identical; those in Dunn's case were as follows:

> In each case, the indictment having been returned by the Grand Jury in the usual manner, and the respondent having denied the truth of the allegations set forth in that indictment by his plea of not guilty, the State has the burden or task of establishing the truth of its allegations by such evidence as is sufficient to convince you of their truth beyond a reasonable doubt. You must, therefore, be satisfied that the evidence which has been presented shows the respondent guilty beyond all reasonable doubt before you can find that he is guilty. This burden of proof, of course, applies separately in each case.
>
> The respondent in any case does not have any burden of proof. It is not up to him to prove to you that he is innocent; it is up to the State to prove to you that he is guilty. A defendant in a criminal case has a constitutional right to remain silent, and the fact that a defendant has exercised that right is not to in-

fluence you against him in any way. If a defendant did not take the stand, you are to draw no inference against that defendant or any other defendant from that fact.

The respondents in these cases, as in all criminal cases, come before the Court with a presumption of innocence, and in each case that presumption continues unless and until the contrary is shown. Before any defendant can be convicted, all reasonable doubt as to his guilt must be removed or eliminated from your minds.

The term reasonable doubt, as I use it, means just what those words ordinarily imply. It is a doubt which is reasonable and excludes a doubt which is unreasonable. It is such a doubt as for the existence of which a reasonable person can give or suggest a good and sufficient reason. It does not mean a trivial or a frivolous or a fanciful doubt nor one which can be readily or easily explained away, but rather such a strong and abiding conviction as still remains after careful consideration of all the facts and arguments against it as would cause a fairminded person to refrain from acting in regard to some transaction of importance and seriousness equal to this case. It is not the object of that rule of proof to impose upon the State an impossible burden, nor is it intended to make you examine and judge the evidence in any strange, peculiar, unreasonable, or extraordinary manner. It is a matter of common knowledge to us all that absolute positive certainty in regard to many of the affairs of life can almost never be attained; and, even in our most important matters, we frequently act upon information which we do not positively know to be absolutely true and which we have no means of verifying, but as to the truth of which we are morally certain. In such instances, there is no reasonable doubt. But where our belief in a fact is so uncertain that we would hesitate to undertake something of importance and seriousness equal to these cases upon the strength of it, then there is a reasonable doubt.

In deciding whether or not the State has met its burden of proof, you will, of course, consider all of the evidence in the case irrespective of which side introduced it. In order for the State to prove a particular defendant guilty, the State must prove in that case all of the essential elements of the offense with which the defendant is charged. I will outline those elements for you. [*Dunn* R. 1071-74; 1091-94.]

Compare *Black* R. 120-22, 124-26.

After all available State remedies were exhausted, Black and

Dunn brought petitions for writs of habeas corpus in the United States District Court for the District of New Hampshire — Black against Cox, Superintendent of the Merrimack County House of Correction, and Dunn against Perrin, Warden of the State Prison. 28 U.S.C. §2254. The prisoners alleged fatal errors in the trial court's instructions on reasonable doubt. The District Court, however, denied both petitions. See Appendix II.

Then on February 2, 1978, the First Circuit reversed. See Appendix I. It professed to find three errors in the trial court's instructions on reasonable doubt. And it deemed the cumulative effect of these supposed errors so prejudicial that it sustained the collateral attacks on the unanimous judgments of the New Hampshire Supreme Court.

The three criticized parts of the instructions are excerpted and discussed in Section II of Reasons For Granting The Writ.

REASONS FOR GRANTING THE WRIT

I. SINCE REASONABLE DOUBT INSTRUCTIONS ARE GIVEN NATIONWIDE IN EVERY CRIMINAL JURY TRIAL, AND SINCE QUESTIONS ABOUT THE PARTICULARS OF SUCH INSTRUCTIONS HAVE CAUSED CONTROVERSY BETWEEN STATE AND FEDERAL COURTS, GUIDANCE FROM THIS COURT IS INDICATED.

The very universality of reasonable doubt instructions makes them a matter worthy of this Court's attention. Both State and Federal courts need to know (1) what is and is not constitutionally permissible and (2) in collateral attack, how much deference Federal courts should give to the judgment of State courts. Present law allows for inordinate debate over where constitutional doctrine ends and semantic overrefinement begins. Such debate casts doubt on numberless State convictions and needlessly irritates the relationship between State and Federal courts.

II. THE FIRST CIRCUIT HAS DECIDED FEDERAL QUESTIONS IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

According to the First Circuit, the trial court's first "misstatement" (Appendix I, at 16) on reasonable doubt was this: "It is such a doubt as for the existence of which a reasonable person can give or suggest a good and sufficient reason."

The "good and sufficient reason" test, however, is unexceptionable both logically and legally. Certainly there can be such a thing as a bad and insufficient reason. And certainly further, a bad and insufficient reason could never provide the basis for a doubt which is supposed to be reasonable. Here, the trial court merely advanced the logic of that idea. See 9 J. Wigmore, *Evidence* §2497 (3d ed. 1940).

Moreover, using terms — "good" and "sufficient" — which were not extreme, but temperate, the trial court brought home to the jury the essence of reasonableness. The First Circuit, though, paid no attention to the moderate nature of these words. It reacted as if the trial court had spoken in more extreme terms, as if the trial court had equated reasonable doubt with a doubt for which a person could give, e.g., only a "compelling" reason. The trial court made no such overstatement.

Note also the context in which the "good and sufficient reason" test was expressed. The doubt it described was to be contrasted with a doubt that was "unreasonable" or "trivial" or "frivolous" or "fanciful." The contrast was fair; for doubts *not* of this latter class are, by mutual exclusion, doubts based on "good and sufficient" reasons. Yet the First Circuit evidently disagreed. Apparently in its view, a trial court may define reasonable doubt only negatively, not positively.

As a matter of law, moreover, the reference to a "good and sufficient reason" was consistent with at least two decisions of the United States Supreme Court. In *Johnson* v. *Louisiana,* 406 U.S. 356 (1972), this Court upheld a system by which a guilty verdict could be reached by only a majority of a jury.

> A majority will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose — when a minority, that is, continued to insist upon acquittal without having *persuasive reasons* in support of its position. At that juncture there is no basis for denigrating the vote of so large a majority of the jury or for refusing to accept their decision as being, at least in their minds, beyond a reasonable doubt. [*Id.* at 361 (emphasis added).]

Thus, even in this Court's contemplation, at the heart of reasonable doubt is a reason which is "persuasive." And only by thin and sophistical reasoning could one argue that there is a meaningful difference between a "good and sufficient" reason and a "persuasive" reason. They are just two ways of saying the same thing. See *United States* v. *Gugliemini,* 384 F.2d 602, 607 (2d Cir. 1967). Cf. *United States* v. *Magnano,* 543 F.2d 431, 437 (2d Cir. 1976), *cert. denied* ____ U.S. ____ (197__); *United States* v. *Christy,* 444 F.2d 448, 450-51 (6th Cir. 1971), *cert. denied* 404 U.S. 949 (1971); and *United States* v. *Aiken,* 373 F.2d 294, 299 (2d Cir. 1967), *cert. denied* 389 U.S. 833 (1967).

In another case, *Holland* v. *United States,* 348 U.S. 121 (1954), aff'g. 209 F.2d 516 (10th Cir. 1954), this Court reviewed the following instructions:

> The jury was told that "beyond a reasonable doubt" did not mean beyond every doubt or leaving no doubt at all, but a doubt based upon *reason and common sense* in the exercise of the jury's *intelligence;* that it meant a *"substantial* doubt, not a trivial doubt; a *significant* doubt, not a flimsy one; a *real* doubt and not an imaginary one." [209 F.2d at 522 (emphasis added).]

In a unanimous opinion, the Supreme Court said:

> Petitioners press upon us . . . the contention that the instructions of the trial court were so erroneous and misleading as to constitute grounds for reversal. *We have carefully reviewed the instructions and cannot agree.* [348 U.S. at 139 (emphasis added).]

The above-quoted instructions were not even deemed questionable, let alone erroneous. They were, however, coupled with one other instruction — discussed below at page 11 — which the Supreme Court did deem erroneous. But even then, the Court found no reversible error. Given (1) the parallel problems of

Holland and these cases and (2) the unanimous opinion in *Holland,* the First Circuit's decision here is not merely analytically attenuated; it is flatly wrong.

The First Circuit also added to its error by turning its back on another line of authority from this Court.

> [In prosecutions] in federal courts, . . . our authority to review jury instructions is a good deal broader than is our power to upset state court convictions by reason of instructions given during the course of a trial. [*Splawn* v. *California,* ____ U.S. ____, ____, 52 L.Ed. 2d 606, 613 (1977).]

Although the Court will exercise that authority if the instructions cause a conviction that violates the Constitution (*Id.*), even then "review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction." *Cupp* v. *Naughten,* 414 U.S. 141, 149 (1973), quoting from *McNabb* v. *United States,* 318 U.S. 332, 340 (1943). Moreover,

> [t]he burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," *Cupp* v. *Naughten,* 414 U.S. 141, 147, not merely whether " . . . the instruction is undesirable, erroneous, or even 'universally condemned,' "*Id.,* at 146. [*Henderson* v. *Kibbe,* ____ U.S. ____, ____, 52 L.Ed. 2d 203, 212 (1977).]

* * *

With continuing inattention to the standards set out in *Splawn, Henderson,* and *Cupp,* the First Circuit carried its criticism to another part of the trial court's instructions. That part said, "we frequently act upon information which we do not positively know to be absolutely true and which we have no means of verifying, but as to the truth of which we are morally certain."

The First Circuit would "not take sides" in the "controversy" over whether proof beyond a reasonable doubt can be equated with proof to a moral certainty (Appendix I, at 17) — even though, as a matter of constitutional law, it would seem that the "controversy" ended long ago. It ended when this Court itself "took sides" and upheld the equation. *Miles* v. *United States,* 102 U.S. 304 (1880); *Wilson* v. *United States,* 232 U.S. 563 (1914).

Then from unwarranted noncommitment, the First Circuit moved to erroneous decision:

> This charge permitted the jury to convict or acquit on the basis of information incapable of verification. Yet the essence of the reasonable doubt standard is that guilt be established not on speculation or intuition, but on evidence and the inferences permitted by law.

This conclusion is wrong for three reasons. First, the trial court never told the jury to abstract from the evidence; on the contrary, it said:

> [T]he State has the burden or task of establishing the truth of its allegations by such *evidence* as is sufficient to convince you of their truth beyond a reasonable doubt. You must, therefore, be satisfied that the *evidence* which has been presented shows the respondent guilty beyond all reasonable doubt. . . . [*Black* R. 120; *Dunn* R. 1071 (emphasis added).]

Second -- and even to state this truism is to belabor it — many things cannot be verified, i.e., proven true (see *Webster's Third New International Dictionary* 2543), in an absolute sense; this, and nothing more, was the trial court's message, as the context makes clear. This very Court, moreover, has conveyed essentially the same message:

> [A] jury is asked to weigh the *chances* that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. . . . [T]he jury must use its experience with people and events in weighing the *probabilities.* [*Holland* v. *United States,* 348 U.S. 138, 140 (1954) (emphasis added).]

See also *Speiser* v. *Randall,* 357 U.S. 513, 525-26 (1958); *Re Winship,* 397 U.S. 358, 364 (1970) (n.b. concurring opinion of

Harlan, J.). Third and finally, the First Circuit resorted to argumentative abstractions. Specifically, it asserted that the instruction inspired "speculation" and "intuition" rather than "inferences permitted by law." We answer (1) the distinction may be more theoretical than real, and (2) to whatever extent the distinction is real, a fair reading of the context shows, again, that the trial court in no sense encouraged "speculation" or "intuition," or any other kind of reasoning that was unconnected to evidence.

* * *

The First Circuit called this part of the trial court's instructions on reasonable doubt "clearly wrong" (Appendix I, at 16): "It does not mean a trivial or a frivolous or a fanciful doubt nor one which can be readily or easily explained away, but rather such a strong and abiding conviction as still remains after a careful consideration of all the facts and arguments advanced against it as would cause a fairminded person to refrain from acting in regard to some transaction of importance and seriousness equal to this case." See *United States* v. *Flannery*, 451 F.2d 880, 882-83 (1st Cir. 1971) (dictum). If, amid a flow of other instructions and on one *hearing* — not even one *reading*, or two or three readings — a juror is genius enough to unscramble this instruction and absorb its full import, then he must be logician enough to see the error it contains.

Under *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973),

> a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *Boyd* v. *United States*, 271 U.S. 104 (1925). While this does not mean that an instruction by itself may never rise to the level of constitutional error, see *Cool* v. *United States*, 409 U.S. 100 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and, instruction of the jury by the judge. Thus, not only is the challenged instruction but one of many instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction.

See also *Henderson* v. *Kibbe*, ____ U.S. ____, ____, 52 L.Ed. 203, 211 (1977); *United States* v. *Park*, 421 U.S. 658, 674-75 (1975); *Andres* v. *United States*, 333 U.S. 740, 743 (1948). Cf. *Turner* v. *United States*, 369 U.S. 398 (1970).

In the present cases, the instruction on "strong and abiding conviction," though error, was harmless error beyond a reasonable doubt. First, its very terms were ultimately ambiguous. To be sure, in parsing the trial court's sentence, one finds that "strong and abiding conviction" does refer to "doubt," not guilt. But such a purely syntactic analysis proves too much; to relate "strong and abiding conviction" to "doubt" is to try to make an equation where none can be made. Common sense — which a jury must be deemed to have — would not even attempt the equation, but would instantly recognize "strong and abiding conviction" and "doubt" for what they are: opposites.

Compare *Holland* v. *United States*, 348 U.S. 121, 140 (1954), where the trial court suggested that reasonable doubt was the kind that a person "might be willing to act upon." It should have suggested the opposite: that reasonable doubt was the kind that "would make a person hesitate to act." This Court, however, found the error nonreversible, and held that *"taken as a whole,* the instructions correctly conveyed the concept of reasonable doubt to the jury." *Id.* (emphasis added).

Second, the remainder of the trial court's instructions was sufficient to undo all the damage that Defendants impute to the contested instruction. "The respondent does not himself have any burden of proof. It is not up to him to prove to you that he is innocent; it is up to the State to prove to you that he is guilty." *Black* R. 120; *Dunn* R. 1071-72. "The respondent . . . comes before the Court with a presumption of innocence, and that presumption continues unless and until the contrary is shown. Before he can be convicted . . . , all reasonable doubt as to his guilt must be removed or eliminated from your minds." *Black* R. 120; *Dunn* R. 1071-72 "[W]here our belief in a fact is so uncertain that we would hesitate to undertake something of importance and seriousness equal to these cases upon the strength

of it, then there is a reasonable doubt." *Black* R. 122; *Dunn* R. 1073.

Third, apart from the instructions, the other components of the cases — especially the evidence itself — overwhelmingly support the verdicts of guilt. See, e.g., *Black* R. 7-10, 14-15, 17, 19-20, 24-28, 34, 36, 40, 44-45, 47, 96; *Dunn* R. 91-92, 94, 102, 104, 105, 109, 111-112, 117-118, 121, 124-125, 133, 408, 420, 422-425, 457, 507, 508, 530, 597-608, 779, 803-804, 930, 934. See *Cupp* v. *Naughten, supra* at 147 (1973).

This Court's recent statement, in *Henderson* v. *Kibbe,* ____ U.S. ____, ____, 52 L.Ed. 2d 203, 212 (1977), bears repeating:

> [t]he burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," *Cupp* v. *Naughten,* 414 U.S. 141, 147, not merely whether " . . . the instruction is undesirable, erroneous, or even 'universally condemned,' " *Id.,* at 146.

The present cases are among those nonreversible cases contemplated in *Harrington* v. *California,* 395 U.S. 251 (1969), and *Chapman* v. *California,* 386 U.S. 18 (1967): "although 'there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error' . . . not all 'trial errors which violate the Constitution automatically call for reversal.' " 395 U.S. at 251-52. Here, the judgments at trial should have been left standing following a "[j]udicious application of the harmless error rule." *Schneble* v. *Florida,* 405 U.S. 427, 431-32 (1972). Although one part of the trial court's instructions might have been imperfect, Defendants were only "entilted to a fair trial . . . not a perfect one." *Lutwak* v. *United States,* 344 U.S. 604, 619 (1953); *Bruton* v. *United States,* 391 U.S. 123, 135 (1968); *Schneble* v. *Florida, supra* at 432.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 77-1408

RICHARD DUNN,
PETITIONER, APPELLANT,

v.

EVERETT I. PERRIN, JR.,
RESPONDENT, APPELLEE.

No. 77-1412

LAURENCE BLACK,
PETITIONER, APPELLANT,

v.

EDWARD COX, et al.,
RESPONDENTS, APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. HUGH H. BOWNES, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH AND CAMPBELL, *Circuit Judges*.

Gilbert Upton, for appellant, Richard Dunn.

Carroll F. Jones, with whom *McSwiney, Jones and Semple* was on brief, for appellant, Laurence Black.

James L. Kruse, Assistant Attorney General, with whom *David H. Souter*, Attorney General, and *Edward A. Haffer*, Assistant Attorney General, on briefs for appellee.

February 2, 1978

COFFIN, *Chief Judge*. Petitioners, convicted of separate crimes in two state trials, sought habeas corpus and appeal the district court's denials of the writ. While different juries heard petitioners' trials, the instructions on reasonable doubt were virtually identical. We reproduce in the margin the instructions as given in Dunn's case.[1] The New Hampshire Supreme Court concluded, in both cases, that the charge as a whole conveyed the correct concept of reasonable doubt. *State* v. *Black*, 116 N.H. 836, 837, 368 A.2d 1177 (1976); *State* v. *Belkner, et al.*, ___ N.H. ___, 374 A.2d 938 (1977). The district court also found no constitutional error when it read the charge as a whole.

We are compelled to disagree. We are fully aware that the charge in each case, apart from its definition of reasonable doubt, is replete with reminders that every element of the crime charged must be proven beyond a reasonable doubt. But the passage defining that critical concept contained no fewer than

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[1] "The term reasonable doubt, as I use it, means just what those words ordinarily imply. It is a doubt which is reasonable and excludes a doubt which is unreasonable. It is such a doubt as for the existence of which a reasonable person can give or suggest a good and sufficient reason. It does not mean a trivial or a frivolous or a fanciful doubt nor one which can be readily or easily explained away, but rather such a strong and abiding conviction as still remains after careful consideration of all the facts and arguments against it and would cause a fair-minded person to refrain from acting in regard to some transaction of importance and seriousness equal to this case. It is not the object of that rule of proof to impose upon the State an impossible burden, nor is it intended to make you examine and judge the evidence in any strange, peculiar, unreasonable, or extraordinary manner. It is a matter of common knowledge to us all that absolute positive certainty in regard to many of the affairs of life can almost never be attained; and even in our most important matters, we frequently act upon information which we do not positively know to be absolutely true and which we have no means of verifying, but as to the truth of which we are morally certain. In such instances, there is no reasonable doubt. But where our belief in a fact is so uncertain that we would hesitate to undertake something of importance and seriousness equal to these cases upon the strength of it, then there is a reasonable doubt."

three different misstatements, ranging from the dubious to the patently erroneous. With this linchpin so weakened, we cannot label the errors harmless beyond a reasonable doubt.

Reasonable doubt is at best a difficult concept to explain to a lay jury. It is also a concept informed by an abundance of precedent. It is not surprising that appellate courts have repeatedly cautioned that attempts to explain reasonable doubt seldom clarify the concept and may flirt with an impermissible reduction of the prosecution's burden of proof. *See Miles* v. *United States,* 103 U.S. 304, 312 (1880); *United States* v. *McDonald,* 455 F.2d 1259, 1263 (1st Cir. 1972). Nevertheless, the court in these two cases obviously felt that a variety of approaches might clarify the concept.

The first formulation was to explain reasonable doubt as "doubt as for the existence of which a reasonable person can suggest a good and sufficient reason." Similar qualifications have received judicial criticism. *See id.* at 1263 (jury must find an "intelligent reason"); *United States* v. *Christy,* 444 F.2d 448, 450 (6th Cir. 1971) (proof must leave the jury with no "reasonable, substantial doubt"). While standing alone, this portion of the charge might not be reversible error, *United States* v. *McDonald, supra,* we think it was improper. It suggested that a doubt based on reason[2] was not enough to acquit, implicitly putting petitioners to the task of proving that the reason was "good and sufficient". *See Cool* v. *United States,* 409 U.S. 100, 104 (1972) (per curiam).

What immediately followed this questionable definition of reasonable doubt was clearly wrong. The court spoke in these words:

> "It [reasonable doubt] does not mean a trivial or frivolous or fanciful doubt nor one which can be readily or easily explained away, but rather such a strong and abiding conviction as still remains after careful consideration of all the facts and arguments . . . ."

[2] Definition of reasonable doubt as doubt which is reasonable has been upheld by numerous courts. *See United States* v. *McDonald,* 455 F.2d 1259, 1262-63 n.4 (1st Cir. 1972).

In *United States* v. *Flannery,* 451 F.2d 880, 883 (1st Cir. 1971), we condemned virtually that exact wording. Although the existence of other reversible error in *Flannery* made it unnecessary for us to resolve the constitutional implications of such a charge, we do so now. That definition of reasonable doubt was the exact inverse of what it should have been. *See United States* v. *Magnano,* 543 F.2d 431, 436 (2d Cir. 1976); *Bernstein* v. *United States,* 234 F.2d 475, 478 n.8 (5th Cir. 1956). Instead of requiring the government to prove guilt, it called upon the defendants to establish doubt in the jurors' minds.[3] That is an inescapable violation of *In re Winship,* 397 U.S. 358, 364 (1969).

The court, continuing in its efforts to clarify, added:

> "It is a matter of common knowledge to us all that absolute positive certainty in regard to many of the affairs of life can almost never be attained, and even in our most important matters, we frequently act upon information which we do not positively know to be absolutely true and which we have no means of verifying, but as to the truth of which we are morally certain. In such instances, there is no reasonable doubt."

Authorities differ on the advisability of equating proof beyond a reasonable doubt with establishment of guilt to a moral certainty. *See United States* v. *Magnano, supra,* 543 F.2d at 437; *United States* v. *Byrd,* 352 F.2d 570, 575 (2d Cir. 1956). We need not take sides in that controversy, however, for proof to either degree based on admissible evidence and proper inferences is far different from what was authorized here. This charge permitted the jury to convict or acquit on the basis of informa-

[3] The state argues that, taken in context, the phrase "strong and abiding conviction" refers not to doubt, but to guilt. While we can see how such an interpretation can be offered, we cannot expect a jury to brush aside grammar and intuit a more sensible meaning, at least not when so crucial a concept as reasonable doubt is our focus.

tion incapable of verification. Yet the essence of the reasonable doubt standard is that guilt be established not on speculation or intuition, but on evidence and the inferences permitted by law. *See Miles* v. *United States, supra,* 103 U.S. at 309; *United States* v. *Guglielmini,* 384 F.2d 602, 607 (2d Cir. 1967).[4]

Finally, petitioners challenge that portion of the charge which defined reasonable doubt as that which would cause the jurors "to refrain from acting in regard to some transaction of importance and seriousness . . . ." That phrase has two elements: reference to refraining from action (as opposed to something like "to be willing to act") and comparison of the decision on guilt or innocence with an important transaction in ordinary life. Addressing the second first, we note that comparison of reasonable doubt in criminal cases with the standard employed by jurors to make even the most significant decisions in their daily lives has been criticized for its tendency to trivialize the constitutionally required burden of proof. *See Scurry* v. *United States,* 347 F.2d 468, 470 (D.C. Cir. 1965); *Commonwealth* v. *Ferreira,* Mass. Adv. Sh. (1977) 1594, 1602.[5] By contrast the "refrain

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[4] The inclusion of other incorrect explanations of reasonable doubt in this charge obviates the need to decide whether this portion would, by itself, warrant reversal.

[5] Judge Wright observed in *Scurry* v. *United States,* 347 F.2d 468, 470 (D.C. Cir. 1965):

> "A prudent person called upon to act in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks tending in both directions. But, in making and acting on a judgment after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Human experience, unfortunately, is to the contrary."

The Supreme Judicial Court of Massachusetts agrees:

> "The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable." *Commonwealth* v. *Ferreira,* Mass. Adv. Sh. (1977) 1594, 1610.

from acting" portion of the charge given here has received widespread approval among the circuits.[6] *See Holland* v. *United States,* 348 U.S. 121, 140 (1954); *United States* v. *Robinson,* 546 F.2d 309, 313 (9th Cir. 1976); *United States* v. *Leaphart,* 513 F.2d 747, 750 (10th Cir. 1975); *United States* v. *Dixon,* 507 F.2d 683, 684 (8th Cir. 1974); *United States* v. *Richardson,* 504 F.2d 357, 361 (5th Cir. 1974); *United States* v. *Restaino,* 369 F.2d 544, 546 (3d Cir. 1966). We find no constitutional infirmity in the combined effect of these two components.

What remains to be resolved is whether those portions of the charge we have found to be erroneous warrant relief by habeas corpus. After *In re Winship, supra,* 397 U.S. at 364, it is obvious the errors are of constitutional magnitude.[7] As the Supreme Court noted, the right to proof beyond a reasonable doubt is indispensable for a criminal defendant. *Id.* at 364. Discussion of the concept is perhaps the most important aspect of the closing instruction to the jury in a criminal trial. *Commonwealth* v. *Ferreira, supra,* Mass. Adv. Sh. (1977) at 1608.

Here reasonable doubt was improperly defined three times. This is thus not a technical error appearing in "artificial isolation", *Cupp* v. *Naughten,* 414 U.S. 141, 147 (1973), or one that was cured by an otherwise proper charge. *See United States* v. *Park,* 421 U.S. 658, 674 (1974). The cumulative effect of the three errors was to obfuscate one of the "essential elements of due process and fair treatment". *In re Winship, supra,* 397 U.S. at 359. Although the evidence against both petitioners was substantial, it could not be said to have been overwhelming. *See Harrington* v. *California,* 395 U.S. 250 (1968). Thus a distinct possibility existed that the jury was misled by the charge. *See Andres* v. *United States,* 333 U.S. 740, 752 (1947).

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[6] The phrases "hesitate to act" and "refrain from acting" are used interchangeably in the case law.

[7] Although in these habeas appeals we are called upon to review state court convictions, the fact that a constitutional right is implicated permits reference to federal precedents for the determination both of whether a violation occurred and whether it was harmless. *Chapman* v. *California,* 386 U.S. 18, 21 (1966).

In *Chapman* v. *California*, 386 U.S. 18, 20 (1966), the Supreme Court indicated that some constitutional errors may be so substantial that they can never be harmless. We leave to another day the question of whether this was such an error. Under the circumstances presented here, a finding of harmlessness beyond a reasonable doubt is not permitted us.

The judgment of the district court is reversed. The writ of habeas corpus shall issue unless, within 90 days from the date of this opinion, the state has either reinstituted proceedings to retry the petitioners or applied for a writ of certiorari. If certiorari is sought and granted, issuance of the writ of habeas corpus shall be stayed pending further order of the Supreme Court. If certiorari is sought and denied, the writ of habeas corpus shall issue unless the state has initiated retrial of the petitioners within 30 days after the date certiorari is denied. Petitioner Black shall remain on bail until such time as retrial is commenced, unless the Supreme Court otherwise orders.

So ordered.

APPENDIX II

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Richard Dunn	)	
	)	
v.	)	Civil Action No. 77-263
	)	
Everett I. Perrin, Jr.	)	
Lawrence Black	)	
	)	
v.	)	Civil Action No. 77-272
	)	
Edward Cox, et al	)	

MEMORANDUM OPINION AND ORDERS

These petitions for writs of habeas corpus, brought pursuant to 28 U.S.C. § 2254, are based on the alleged unconstitutionality of almost identical jury instructions given by the same trial judge. Dunn is presently in the custody of the Warden of the New Hampshire State Prison, and Black is in the custody of the Superintendent of the Merrimack County House of Correction. Both petitioners have exhausted their state remedies as required by 28 U.S.C. § 2254 (b).

The petitioners both allege that the portion of the trial judge's charge defining reasonable doubt deprived them of their constitutional right to a fair trial and due process of law.

Black was tried and convicted for theft of less than one hundred dollars and tampering with a witness and was sentenced to the Merrimack County House of Correction for six months.

Dunn was tried and convicted of the offense of riot, a class B felony under New Hampshire law, and was sentenced to serve not less than three nor more than six years in the New Hampshire State Prison.

The charges are set forth fully in Exhibits 1 and 2. In Dunn's case, the charge was given twice; once at the conclusion of the trial and again the following day.

As the New Hampshire Supreme Court held in *State* v. *Black*, 116 N.H. 836 (1976), 368 A.2d 1177 (1976), in determining whether a portion of a jury charge constitutes reversible error, the entire charge must be considered. In *United States* v. *Park*, 421 U.S. 658, 674 (1975), the United States Supreme Court stated:

> Turning to the jury charge in this case, it is of course arguable that isolated parts can be read as intimating that a finding of guilt could be predicated solely on respondent's corporate position. But this is not the way we review jury instructions, because "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973). *See Boyd* v. *United States*, 271 U.S. 104, 107 (1926).

The portion of the charge to which the petitioners object is as follows:

> The term reasonable doubt, as I use it, means just what those words ordinarily imply. It is a doubt which is reasonable and excludes a doubt which is unreasonable. It is such a doubt as for the existence of which a reasonable person can give or suggest a good and sufficient reason. It does not mean a trivial or a frivolous or a fanciful doubt nor one which can be readily or easily explained away, but rather such a strong and abiding conviction as still remains after a careful consideration of all the facts and arguments advanced against it and would cause a fairminded person to refrain from acting in regard to some transaction of importance and seriousness equal to these cases. It is not the object of this rule of proof to impose upon you the duty of examining and judging the evidence in any strange, peculiar, extraordinary, or unreasonable manner, nor is it intended to place on the State an impossible burden. It is a matter of common knowledge to us all that absolute positive certainty in regard to many of the affairs of life can almost never be attained, and, even in our most important matters, we frequently act upon information which we do not positively know to be absolutely true and which we have no means of verifying, but as to the truth of which we are morally certain. In such instances there is no reasonable doubt. But where our belief in a

> fact is so uncertain that we would hesitate to undertake something of importance and seriousness equal to these cases upon the strength of it, then there is a reasonable doubt. [Emphasis added.]

The petitioners particularly object to the underscored lines. I am well aware that the First Circuit criticized similar language in *United States* v. *Flannery*, 451 F.2d 880, 882-83 (1st Cir. 1971). But the court did not hold that the charge was reversible error.

In Black's case, the entire charge starts at page 118 of the record and continues to page 127. The portion to which the petitioner objects is found on page 121. The jury was correctly instructed as to the role of indictments in a criminal prosecution on page 119, and, on page 120 just prior to the objected portion, the trial judge stated:

> You must, therefore, be satisfied that the evidence which has been presented shows the respondent guilty beyond all reasonable doubt before you can find that he is guilty. Of course, this rule as to the burden of proof applies separately in each one of the three cases. The respondent does not himself have any burden of proof. It is not up to him to prove to you that he is innocent; it is up to the State to prove to you that he is guilty.

On page 122 immediately following the objected portion, the court charged:

> In order to prove the respondent guilty on any one of the charges, the State must prove all of the essential elements of the particular charge beyond a reasonable doubt.

Again, on page 124, the jury was told:

> If the State has proven all of the essential elements of the offense of theft of the bicycle as I have outlined them for you, and proved them beyond a reasonable doubt, then the respondent is guilty. On the other hand, if the State has failed to prove any one or more of the essential elements of the offense charged beyond a reasonable doubt, then the respondent is not guilty.

This instruction was given on pages 125 and 126 in regard to another offense.

In Dunn's case, the charge was longer than in Black's case because it involved four defendants and offenses that required a more lengthy explanation. The first charge starts at page 1067 and goes to page 1079. The second charge, which is practically identical and which was given the next day, starts at page 1087 and was completed at page 1099. My comments apply equally to both charges; the page references are to the first charge. At page 1068, the trial judge instructed the jury carefully that the

> State must prove the essential elements of the offense charged beyond a reasonable doubt whether the evidence be circumstantial or direct.

On the same page, the court stated:

> The State need not prove each evidentiary fact beyond a reasonable doubt, but must prove all of the essential elements of the crime charged beyond a reasonable doubt.

On page 1071, the jury was again told that they could not find a defendant guilty unless they were satisfied:

> You must, therefore, be satisfied that the evidence which has been presented shows the respondent guilty beyond all reasonable doubt before you can find that he is guilty.

On page 1072, the jury was told:

> It is not up to him to prove to you that he is innocent; it is up to the State to prove to you that he is guilty.

Again, on page 1072:

> Before any defendant can be convicted, all reasonable doubt as to his guilt must be removed or eliminated from your minds.

On page 1074 immediately following the definition of reasonable doubt, the jury was again instructed that:

> In order for the State to prove a particular defendant guilty, the State must prove in that case all of the essential elements of the offense with which the defendant is charged.

The burden of proof was explained correctly on pages 1076 and 1077:

> If the State has proven beyond a reasonable doubt all of the essential elements of the offense with which a particular defendant is charged, as I have outlined those elements, then the defendant is guilty as charged. If the State has failed to prove beyond a reasonable doubt any one or more of the essential elements of the offense with which a particular defendant is charged, the defendant is not guilty.

While the portions of the charge objected to, if read alone or given undue emphasis, might be confusing and even misleading, there can be no doubt that, when either charge is read as a whole, there was no constitutional error. In *Holland* v. *United States,* 348 U.S. 121, 140 (1954), the Court, in reviewing a charge which contained a section remarkably similar to the one here, stated:

> Even more insistent is the petitioners' attack, not made below, on the charge of the trial judge as to reasonable doubt. He defined it as "the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon." We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act, *see Bishop* v. *United States,* 71 App. D.C. 132, 137-138, 107 F.2d 297, 303, rather than the kind on which he would be willing to act. But we believe that the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some. A definition of a doubt as something the jury would act upon would seem to create confusion rather than misapprehension. "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury," *Miles* v. *United States,* 103 U.S. 304, 312, and we feel that, taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury.[1]

The petitions for writ of habeas corpus are denied as to both petitioners.

In Civil No. 77-272, *Black* v. *Cox, et al,* the Motion for Release on Bail Pending Appeal is denied.

SO ORDERED.

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1. *See Holland* v. *United States,* 209 F.2d 516, 522 (10th Cir. 1954), for a more complete exposition of the charge.

APPENDIX III

STATE of New Hampshire

v.

Lawrence BLACK.

No. 7499.

Supreme Court of New Hampshire.

Dec. 30, 1976.

David H. Souter, Atty. Gen., and Edward A. Haffer, Asst. Atty. Gen., for the State.

McSwiney, Jones & Semple, Concord (Carroll F. Jones, Concord, orally), for defendant.

GRIFFITH, Justice.

Defendant was convicted in a trial by jury of theft of less than $100 and of tampering with a witness in violation of RSA 641:5 I (b). Defendant's exceptions were reserved and transferred by the Trial Court (*Keller*, C.J.).

The defendant testified in his own defense during the trial and the State was permitted to introduce three prior convictions as bearing on his credibility. Defendant urges in support of his exception to the trial court's ruling on the introduction of these convictions the age of the convictions and defendant's own age at the time of the convictions.

It appears that in 1966, slightly less than ten years before the trial in this case, when the defendant was seventeen years of age,

he pleaded guilty to three felony indictments. The defendant was represented by counsel at that time and under the law in effect in 1966 he was not a juvenile. Laws 1965, 256:1, :7, :8. The trial court considered the admissibility of the convictions in advance of trial and gave proper limiting instructions both at the time of their admission and in its charge. We find no abuse of discretion in the trial court's conclusion that the value of the convictions as bearing on defendant's credibility outweighed any prejudice to his case. *State* v. *Cote*, 108 N.H. 290, 235 A. 2d 111 (1967); *State* v. *Blake*, 113 N.H. 115, 305 A.2d 300 (1973); *see United States* v. *Belt*, 169 U.S.App.D.C. 1, 514 F.2d 837, 849 (1975).

The defendant excepted to the trial court's charge on reasonable doubt and particularly to the trial court's apparent reference to reasonable doubt as "such a strong and abiding conviction as still remains after a careful consideration of all the facts and arguments advanced against it. . . ." Defendent relies upon *United States* v. *Flannery*, 451 F.2d 880, 882-83 (1st Cir. 1971) where the court criticized similar language in a charge and said: "We believe that in charging the jury, with respect to reasonable doubt, that 'a reasonable doubt can be defined as a strong and abiding conviction that still remains after careful consideration of all the evidence,' the court must have misspoken itself." The criticism of this type of language in *Flannery* was by way of dictum after a new trial had been ordered on another issue. However valid the criticism, the opinion did not consider the entire charge of the court on the issue of reasonable doubt or determine that the charge on this issue was prejudicial to the defendant.

"[A] single instruction to a jury may not be judged in artifical isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed2d 368, (1973). The criticized phrase here occurs near the beginning of a page and a quarter of instruction on reasonable doubt. The remaining instructions are clear and unobjectionable and close with the following sentence: "But where our belief in a fact is so uncertain that we would hesitate to undertake something of importance and seriousness equal to these cases upon the strength of it, then there is a reasonable doubt."

This is the accepted definition of reasonable doubt approved by this court (*State* v. *Slade*, 116 N.H. 436, 362 A.2d 194 (1976); *State* v. *Booton*, 114 N.H. 750, 761-62, 329 A.2d 376, 385 (1974); *State* v. *Hutton*, 108 N.H. 279, 289, 235 A.2d 117, 124 (1967)) and the United States Supreme Court (*Holland* v. *United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 99 L.Ed. 150 (1954)). The charge as a whole conveyed the correct concept of reasonable doubt to the jury and any possible prejudicial effect of the phrase was harmlessly lost in the totality of the instructions.

Exceptions overruled.

All concurred.

APPENDIX IV

STATE of New Hampshire

v.

William BELKNER.

STATE of New Hampshire

v.

Jaan LAAMAN.

STATE of New Hampshire

v.

Richard DUNN.

Nos. 7643-7645.

Supreme Court of New Hampshire.

May 31, 1977.

David H. Souter, Atty. Gen., and James L. Kruse, Asst. Atty. Gen. (Mr. Kruse orally), for the State.

John C. Emery, Manchester, by brief and orally, for defendant Belkner.

William H. Kelley and John Czecuik, Manchester (Mr. Czecuik orally), for defendant Laaman.

J. Gilbert Upton, Concord, by brief and orally, for defendant Dunn.

GRIMES, Justice.

These appeals arise out of the Christmas Day 1975 riot at the New Hampshire State Prison (hereinafter "prison"). Defendants were all tried by jury and convicted of riot as a class B felony pursuant to RSA 644:1 I (a) and RSA 644:1 IV.

Defendants raise a multitude of issues claiming that they did not receive a fair trail. All questions of law were reserved and transferred by *Keller,* C. J. For purposes of discussion these issues are grouped in the following categories: (1) motions to quash and sever; (2) admissibility of Belkner's conversation with inmate West; (3) motions for mistrial; (4) argument and instructions; (5) new trial and motions to dismiss.

The following facts could be found from testimony given at trial. On Christmas Day in 1975 there was minimal staffing at the prison, a fact generally known by the inmates. The inmates arrived five minutes earlier than usual for lunch, smoked at lunch contrary to prison rules and normal routine and sat in locations they did not normally sit in. Dunn and Laaman sat near the front of the dining hall near the door leading to the cell block, contrary to their regular practice. The inmates remained in the dining area upon finishing their lunches rather than returning to their cells.

Early in the meal Dunn told inmates surrounding him to be sure the door to the cell block could not be locked. It was generally known by the inmates that when there was trouble the door to the cell block was locked and tear gas was fired into the dining area. Bonin, the officer in charge, did not have access to the cell block as the doorway was blocked by several inmates.

Near the end of the dining period, Dunn rose and spoke to Bonin and the 146 inmates present. Dunn complained that the inmates wanted the prisoners in punitive status to come out and have Christmas dinner. He further stated that he was fed up with the prison rules and that the inmates would not leave the dining room until the warden came down to speak with them. These and other messages were relayed to the warden by Officer Rice, a guard.

Dunn made several more speeches to the crowd conferring on occasion with Laaman. The inmates responded to these speeches

with loud roaring and banging. Several inmates made taunting remarks to the guards present. Officer Rice returned with messages from the warden. The warden stated that he had arranged for the prisoners in punitive status to have Christmas dinner, that the inmates were to return to their cells and that the warden would not come to the dining room. Dunn responded that this was not good enough and they wanted the warden down. The warden relayed a message to the effect that he would speak with representatives of the population but that he would not come to the dining area. The warden suggested Dunn and Laaman as representatives as they had been identified to him as the leaders. Laaman hollered to Dunn that if he went up to see the warden he would probably not be coming back. Dunn then turned to the crowd and asked if they wanted him to go up alone to which they responded in the negative with more shouting and banging.

At this point the atmosphere was very excited and Bonin feared for himself and the staff in the kitchen. Various inmates had threatened guards with physical violence. Bonin requested permission from Dunn to leave with the kitchen staff. Dunn said they could go. As Bonin and the staff filed out between lines of inmates, the inmates hummed the death march. Before they reached the doorway, a loud crash was heard in the cell block and inmates surged toward the door. A large construction staging had been pulled down. A guard and the prison steward were hit and injured. Tear gas was then fired into the area and the inmates were eventually evacuated. Extensive property damage was done to the cell block and kitchen from fires that had been started in the officers' cabinets.

I. *Motions to Quash and Sever*

Defendant Belkner first contends that the trial court erred in denying his motion to quash the indictment against him. Belkner alleges that the indictment is insufficient in that it charges him with more than one offense and he could not properly assess the charges against him.

The indictment against Belkner precisely tracks the language of RSA 644:1 I (a). In addition it supplies underlying factual allegations so that Belkner was specifically apprised of his alleged

offensive conduct. Belkner's confusion apparently arises out of language in the indictment relating to RSA 644:1 IV. RSA 644:1 IV raises the status of riot as defined by RSA 644:1 I from a misdemeanor to a class B felony when personal injury or property damage results from the conduct.

RSA 644:1 IV is not an offense separate from RSA 644:1 I, but rather is an aggravated status of that same offense. The indictment specified sufficient facts so that defendant was apprised that he was being indicted for riot as a class B felony. The indictment informed Belkner with sufficient definiteness to enable him to prepare a defense and therefore the court did not err in denying Belkner's motion to quash. *State* v. *O'Neill,* 105 N.H. 15, 191 A.2d 528 (1963); *State* v. *Hoyt,* 114 N.H. 256, 319 A.2d 286 (1974). The fact that defendant was charged in the conjunctive while the statute is phrased in the disjunctive does not invalidate the indictment. Only one offense, "riot," was charged and judgment will bar any future trial of the defendant for riot. *State* v. *Harlan,* 116 N.H. 598, 364 A.2d 1254 (1976).

Defendants Dunn and Laaman argue that the court erred in denying their motions to sever *State* v. *Belkner* from *State* v. *Dunn* and *Laaman*. The thrust of defendants' argument on this point is that Belkner's case involved physical injury to the prison steward while their cases did not involve infliction of physical injury. They allege that introduction of this evidence against Belkner was higher inflammatory to the jury and that their cases were unrelated to that of *Belkner*.

RSA 644:1 IV reads in pertinent part: "Riot is a class B felony if, in the course of and as a result of the conduct, any person suffers physical injury . . ." This statement taken in conjunction with the language of RSA 644:1 I, the offense with which all three of the defendants were charged, makes it clear that Dunn and Laaman need not have personally engaged in the actual acts of physical violence to be prosecuted for a class B felony under RSA 644:1 IV. Therefore, as Dunn and Laaman correctly admitted at the hearing on their motions to sever, this evidence was also admissible against them as well as against Belkner. We, therefore, cannot see how the mere joinder of the *Belkner* case

with that of Dunn and Laaman was prejudicial to them. Furthermore, all defendants were charged solely with violation of RSA 644:1 I (a) and for the most part the same witnesses were to be called for both cases. The charges all arose out of the same event and in the interest of efficiency it was proper for these cases to be consolidated. The court did not abuse its discretion in denying the motions to sever. *State* v. *Chickering,* 97 N.H. 368, 89 A.2d 206 (1952); ABA Project on Minimum Standards for Criminal Justice, Joinder and Severance § 2.3 (Approved Draft, 1968).

II. *Admissibility of Belkner's Conversation with Inmate West*

Defendants all claim that a conversation which took place between inmate West and defendant Belkner, which was admitted over objection, was so prejudicial that defendants were denied a fair trial. They further claim that the conversation was hearsay and inadmissible as such.

Roland Fleury, a paroled inmate, testified at defendants' trial that he had seen someone holding a pipe over the prison steward's head. When asked who was holding the pipe, Fleury stated that he could not reveal the identity of the person for "personal reasons, very strong reasons." In chambers, Fleury stated that a threat against his life had been conveyed to him by his sister from one Tweedel, a guard at the prison. Tweedel was called in chambers and stated the nature of the conversation to the court. The court decided that the testimony was admissible as conduct indicative of a guilty frame of mind. Tweedel was then allowed to testify in front of the jury, over objection, to the following conversation which he overheard while on duty at the prison on December 28, 1975:

> West: They slipped Roland (Fleury) out of prison and he ratted us out.
>
> Belkner: We've got plenty of friends at all the joints and we'll get letters out and find out where he's at.
>
> West: We'll find him and kill the little bastard.

Defendants concede that attempts by an accused to threaten witnesses or prevent them from testifying are admissible against

the accused in evidence. 2 J. Wigmore, Evidence §§ 273, 277, 278 (3d ed. 1940); 1 C. Torcia, Wharton's Criminal Evidence § 217 (13th ed. (1972)); Annot., 62 A.L.R. 136 (1929). Defendants claim, however, that in order to be admissible the threats must be linked to Belkner and that there is no evidence to show that Belkner adopted West's threats. We are of the opinion that Belkner's own words could have been found by the court to be threatening to the witness and were admissible as such. *See* 2 J. Wigmore *supra.*

At the conclusion of this testimony the court instructed the jury that the conversation was to be considered only in the Belkner case and that it was not evidence against Dunn and Laaman. These limiting instructions properly removed any prejudice to Dunn and Laaman.

The court was informed in advance as to what Tweedel's testimony was to be. The court allowed defense counsel to make their objections and argue them at that time. At the conclusion, the court determined that the testimony was admissible and that its value outweighed any prejudice to Belkner. *State* v. *Black,* 116 N.H. —, 368 A.2d 1177 (1976). We find that the record supports the determination of the court.

The statements were not hearsay because they were not offered to prove any fact contained therein but only to show that the statements were made. C. McCormick, Law of Evidence §§ 246, 249 (2d ed. 1972); 6 J. Wigmore, Evidence § 1790 (Chadbourn rev. 1970).

III. *Motions for Mistrial*

Shortly after the trial commenced, the *Manchester Union Leader* and the *Concord Monitor* published articles relating to defendants. The article in the *Concord Monitor* stated that defendants could receive up to seven years if convicted and included a picture of defendants. The article in the *Union Leader* described the damage done to the prison and on an inner page defendants' criminal records were set forth.

Although the court had instructed the jurors not to read the newspapers or converse about the case, it polled the jurors relative to these articles. Several of the jurors knew of the existence of articles in the papers, but only one juror had read any article and this juror was dismissed by the court. The court then ordered the jury sequestered for the remainder of the trial.

Determination of jury prejudice from news articles is a matter within the discretion of the trial court. *State* v. *Booton,* 114 N.H. 750, 758, 329 A.2d 376, 383 (1974). Here the jury was polled and the only juror who might have been prejudiced was dismissed from the case. Defendants can hardly claim prejudice from the mere fact that the jurors knew there were articles in the newspapers. We find the court handled the problem in a manner completely consonant with accepted standards. ABA Project on Minimum Standards for Criminal Justice, Fair Trial and Free Press § 3.4 (b) (Approved Draft 1968).

All of the defendants argue that the court erred in not declaring a mistrial when the warden characterized Dunn and Laaman as ringleaders while responding to a question from counsel for defendant Guay, a defendant who was also tried with Belkner, Dunn and Laaman but acquitted. The statement made by the warden was, "I said I would not go down but that I would speak to representatives, including those that had been identified as the ringleaders to me of this particular revolution—Laaman, Dunn—." Counsel for Laaman objected to the statement and moved to strike the answer. The court sustained the objection and the answer was stricken. The court admonished the witness to make no further statements regarding what was told him about who were ringleaders. When charging the jury the court instructed that the jury was to completely disregard any testimony that had been stricken from the record.

The defendants claim that this answer was hearsay, unresponsive, that it was for the jury to determine who was responsible for the sit-in, and that no amount of instruction could eradicate the prejudice causes by the statement. A mistrial is to be declared where, "the existence of some circumstances . . . indicates that justice may not be done if the trial continues to verdict." *State* v. *Booton,* 114 N.H. 750, 757, 329 A.2d 376, 382 (1974). The trial court found that such circumstances did not exist in denying the motion and upon review of the record we find no error in this determination.

IV. *Argument and Instructions*

Defendant Laaman complains that the prosecutor's closing argument regarding knowledge of the "game plan" was so devoid of evidentiary support that it was unduly prejudicial. However, a reading of the record discloses that no objection was made by counsel for Laaman to this nor to any other part of the prosecutor's argument. It is the policy of this state to require timely objections so that corrective measures may be taken during trial. *See State* v. *Lemire,* 115 N.H. 526, 534, 345 A.2d 906, 912 (1975) ; *State* v. *Breest,* 115 N.H. 504, 505-06, 345 A.2d 391, 392 (1975) . As no objection was raised and reserved below this issue is waived. *Id.; State* v. *Lemire, supra,* 115 N.H. at 534, 345 A.2d at 912. Furthermore, the court cautioned the jury that they were to take their own recollection of the evidence and that the arguments were not statements of fact.

Defendant Laaman claims that the court erred in instructing the jury regarding the criminal liability of an accomplice, and defendant Dunn claims that the court erred in instructing the jury on the elements of the offense of riot. We note that Dunn proposed no instruction on riot so that the court could have charged something more favorable to him. Here again, neither defendant objected to the instructions either during the charge or immediately thereafter. Not having raised and preserved these objections below defendants cannot raise them here for the first time. *State* v. *Taschler,* 116 N.H. 218, 221, 356 A.2d 697, 699 (1976) .

Defendants Dunn and Laaman argue that the court's instruction on reasonable doubt was plain error and denied defendants a fair trial. Defendants object to that portion of the court's instruction which states, "It does not mean a trivial or a frivolous or a principal doubt nor one which can be readily or easily explained away but rather such a strong and abiding conviction as still remains after careful consideration of all the facts and arguments against it. . . ." They rely on *United States* v. *Flannery,* 451 F.2d 880 (1st Cir. 1971) , where the court there criticized a similar charge.

The very argument made by defendants was rejected by this

court in *State* v. *Black,* 116 N.H. —, 368 A.2d 1177 (1976) . "A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten,* 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.E.2d 368 (1973) . The court here gave a page and a quarter of instructions on reasonable doubt using a variety of descriptions which taken in their totality clearly conveyed the correct concept of reasonable doubt. *State* v. *Black,* 116 N.H. —, 368 A.2d 1177 (1976) ; *State* v. *Slade,* 116 N.H. 436, 362 A.2d 194 (1976) ; *State* v. *Booton,* 114 N.H. 750, 329 A.2d 376 (1974) .

V. *New Trial and Motions to Dismiss*

Defendant Laaman next complains that there was insufficient evidence for him to be found guilty of riot pursuant to RSA 644:1 I (a) and that the court erred, therefore, in denying his motions for new trial and to dismiss.

Laaman was charged with promoting and facilitating the issuance of demands to the prison administration as well as threats directed at prison guards present in the prison dining area on December 25, 1975. The record shows that Laaman was present in the dining area and conferred with Dunn on several occasions during the course of Dunn's speech and threats. When prison guard Rice returned from the warden's office to the dining area to bring the warden's response to inmates' demands, Laaman asked Rice what the hell he was doing there. Further, Laaman loudly cautioned Dunn against going to meet with the warden to present inmates' grievances stating that if Dunn went up there he would probably not return. Laaman refused to leave the dining area at the warden's request and made no effort to disassociate himself from the scene when Dunn announced that the inmates would take a stand against any invasion of the "goon squad" and that some of the inmates might be killed. There was also some evidence that Laaman was knowledgeable as to the inmates' "game plan." It could be inferred from his statements and conduct that his conferences with Dunn were for the purpose of assisting him.

It is well settled in this state that when reviewing evidence for the purposes of a motion to dismiss, the evidence must be taken

" 'in the light most favorable to the State with all reasonable inferences therefrom.' *State* v. *Canney*, 112 N.H. 301, 303, 294 A.2d 382, 383 (1972)." *State* v. *Gilbert*, 115 N.H. 665, 666, 348 A.2d 713, 714 (1975). We cannot say in reviewing the record that using this standard the jury could not have found Laaman guilty beyond a reasonable doubt.

The granting of a new trial is a question of fact for the trial court and its ruling will not be disturbed unless it appears that it resulted from mistake, partiality, or corruption. *See State* v. *Wren*, 77 N.H. 361, 92 A. 170 (1914). Laaman was heard by the court on his claim and it was rejected by the court which thereby implicitly found that the defendant's conviction was not unjust. *Id.; State* v. *Lemire*, 115 N.H. 526, 345 A.2d 906 (1975). There was no error in denying Laaman a new trial.

The final claim made by defendants is that the court erred in denying their motion for new trial and to poll the jury. The motion is based on the following allegations. The jury having been sequestered asked permission to work on Saturday, May 29, and on Monday, May 31, which was Memorial Day, a holiday. Permission was granted and the jury worked on both days. Defendants conclude from this that the jury was exhausted. On Sunday, May 30 at 10:20 P.M., one of the jurors died which defendants claim further exhausted and demoralized the jurors. Dunn claims that one of the attorneys in his counsel's firm personally knew one of the jurors. Upon being approached, this juror stated that another juror had had a strong conviction that defendants were innocent. Defendants conclude that this juror yielded her conviction from her exhaustion and shock at the death of a fellow juror.

The court held a detailed hearing on this motion. The sheriff and two deputies who supervised the jurors testified that the jury had been exceedingly good about having to be sequestered. The sheriff testified that the jury wanted to continue to work on the case on Saturday and Monday because they were "into" the case. He also testified as did the deputies that while the jurors were saddened at the death of a fellow juror the jurors appeared otherwise unaffected by the death.

In our opinion the court correctly found that the defendants' claims were unsubstantiated by the evidence. Polling of the jury is a matter in which the trial court has broad discretion. *LeClerc* v. *Gray*, 112 N.H. 430, 298 A.2d 116 (1972); *Bothwick* v. *LaBelle*, 115 N.H. 279, 339 A.2d 29 (1975). Denial of such a motion will be overturned only for abuse of discretion and we find no abuse here. *Id.; State* v. *Mann*, 112 N.H. 412, 297 A.2d 664 (1972).

Exceptions overruled.

All concurred.